

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex Parte ANGEL A. GUERRERO, ANTHONY VARGAS  
and ALAN J. MEYERS

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Appeal No. 95-3969  
Application 08/181,273<sup>1</sup>

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ON BRIEF

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Before RONALD SMITH, GRON, and WEIFFENBACH, Administrative Patent Judges.

WEIFFENBACH, Administrative Patent Judge.

**DECISION ON APPEAL**

This is a decision on appeal under 35 U.S.C. § 134 from the examiner's final rejection of claims 1-8 and 10-14, which are all of the claims remaining in the application. We reverse.

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<sup>1</sup> Application for patent filed January 13, 1994.

### **Claimed Subject Matter**

The claims on appeal are directed to a cosmetic product and a method of using the same. The cosmetic product is dispersed from a multi-compartment dispenser wherein a first substance is dispersed from one compartment and a second substance is dispersed from a second compartment. The first substance is an anhydrous composition comprising ascorbic acid and a carrier and the second substance is an aqueous composition of an alkaline agent having a pH from about 7 to about 11. Claim 1 is representative of the claimed subject matter and reads as follows:

1. A cosmetic product which is formed as a multi-compartment dispenser, wherein a first and second substance are stored apart from one another in separate compartments of the dispenser:
  - (i) the first substance being an anhydrous composition comprising:
    - a) from 0.001 to 50% by weight of ascorbic acid; and
    - b) from 5 to 99.9% by weight of a pharmaceutically acceptable carrier; and
  - (ii) the second substance being an aqueous composition with a pH ranging from about 7 to about 11 comprising from 40 to 99% water and 1 to 30% of an alkaline agent present in an effective amount to cause a rise of at least 0.5 units in pH of the first substance when blended therewith, and wherein the first and second substances are blended together just prior to use so as to topically deliver a final blended composition to skin whose acidity is insufficient to cause irritation but, nevertheless, delivers active ascorbic acid.

### References of Record

The following references of record are relied upon by the examiner as evidence of obviousness:

Kiozpeoplou	4,487,757	Dec. 11, 1984
Fine	5,298,237	Mar. 29, 1994 (Filed Jan. 24, 1992)

### The Rejections<sup>2</sup>

Claims 1-8 and 10-12 stand rejected under 35 U.S.C. § 103 as being obvious over Kiozpeoplou in view of Fine.

Claims 13 and 14 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which appellants regard as the invention in that the phrase “overall healthier and younger-looking” is an indefinite description which requires subjective determination.

### Opinion

We have carefully considered the respective positions advanced by appellants and the examiner. We cannot sustain either of the examiner's rejections. The examiner has not made out a *prima facie* case of obviousness because the examiner has not established why a person having ordinary skill in the art would

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<sup>2</sup> The final Office action included a rejection of claims 13 and 14 under 35 U.S.C. § 101 as lacking utility and a rejection of claims 13 and 14 under the first paragraph of 35 U.S.C. § 112. These rejections have been withdrawn by the examiner (answer: p. 2, ¶ 4).

Appeal No. 95-3969  
Application 08/181,273

have been motivated to select the ascorbic acid disclosed in Fine for the acid component in Kiozpeoplou. As for the rejection under 35 U.S.C. § 112, this rejection cannot be sustained because the phrase objected to is functional and because its presence in the preamble in the claim does not render the claimed method indefinite. For the foregoing reasons, the decision of the examiner is reversed.

**REVERSED**

RONALD H. SMITH	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
TEDDY S. GRON	)	
Administrative Patent Judge	)	APPEALS AND
	)	
	)	INTERFERENCES
	)	
CAMERON WEIFFENBACH	)	
Administrative Patent Judge	)	

Appeal No. 95-3969  
Application 08/181,273

Patent Department  
Unilever United States, Inc.  
45 River Road  
Edgewater, NJ 07020